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IN THE

# Supreme Court of the United States

October Term, 1974

## No. 74-362

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
*Petitioners,*

*v.*

NOAH C. A. WALTER, Deputy Commissioner,
U. S. Department of Labor,
Bureau of Employees' Compensation,
and
MARY JONES,
*Respondents.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

## REPLY BRIEF FOR RESPONDENT, MARY JONES

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## REPLY BRIEF FOR RESPONDENT, MARY JONES

## QUESTION PRESENTED

The question is felt to be more specifically stated as:

When an injured claimant[1] has duly filed a claim under #913(a) of the Longshoremen's and Harbor

[1] The injured claimant, Charles E. Jones, is now an adjudicated incompetent, his court appointed guardian being his wife, Mary Jones, the Respondent, and hereafter referred to as the "claimant".

Workers' Compensation Act,[2] as applicable to the District of Columbia, the employer's carrier[3] denies the permanent disability claimed, and the claimant only received compensation for temporary disability under #914(a), (b) and (e) of the Act without the deputy commissioner having ever heard and adjudicated the claim, is the unadjudicated claim for permanent disability barred by #922 of the Act unless an additional claim is filed within one year of the last payment of temporary compensation?

## STATUTES AND REGULATIONS INVOLVED

STATUTES: In addition to the statutes cited in the carrier's brief, the following are felt to be relevant:

United States Code, Title 33:

#914. Payment of compensation

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

---

[2] The Longshoremen's and Harbor Workers' Compensation Act will hereafter be referred to as the "Act".

[3] The interest of the employer and carrier are the same and will hereafter be referred to as the "carrier".

(c) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be.

(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an

interlocutory injunction staying payments is allowed by the court as provided therein.

(g) Within sixteen days after final payment of compensation has been made, the employer shall send to the deputy commissioner a notice, in accordance with a form prescribed by the Secretary, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the deputy commissioner within such time the Secretary shall assess against such employer a civil penalty in the amount of $100.

(h) The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold hearings, and take such further action as he considers will properly protect the rights of all parties.

. . . .

Mar. 4, 1927, c. 509, #14, 44 Stat. 1432; May 26, 1934, c. 354, #4, 48 Stat. 807; June 25, 1938, c. 685, #7, 52 Stat. 1167; June 24, 1948, c. 623, #5, 62 Stat. 603; July 26, 1956, c. 735, #5, 70 Stat. 655; July 14, 1961, Pub.L. 87-87, #3, 75 Stat. 203.

#919. Procedure in respect of claims

(a) Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

. . . .

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose.

(e) The order rejecting the claim or making the award (referred to in this chapter as a com-

pensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

. . . .

Mar. 4, 1927, c. 509, #19, 44 Stat. 1435; June 25, 1938, c. 685, #9, 52 Stat. 1167; June 11, 1960, Pub.L. 86-507, #1(30), (31), 74 Stat. 202.

#920. Presumptions

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

. . . .

Mar. 4, 1927, c. 509, #20, 44 Stat. 1436.

#921. Review of compensation orders

(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

. . . .

Mar. 4, 1927, c. 509, #21, 44 Stat. 1436; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646,

#32(b), 62 Stat. 991; May 24, 1949, c. 139, #127, 63 Stat. 107.

#923. Procedure before the deputy commissioner

(a) In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

. . . .

Mar. 4, 1927, c. 509, #23, 44 Stat. 1437.

The following regulations of the Bureau of Employees' Compensation are relevant:

20 C.F.R. (1972):

#31.5 Claims for compensation.

A claim for compensation may be filed with the deputy commissioner for the compensation district in which the injury occurred at any time after the first 7 days of disability following any injury, or at any time after death. The right to compensation for disability shall be barred unless a claim therefor is filed within 1 year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within 1 year after the death, except that if payment of compensation

has been made without an award on account of such injury or death, a claim may be filed within 1 year after the date of the last payment, and except that where the said act provides for the running of the said year limitation from any other date, the provisions of said act shall apply. For the purpose of filing such claims the Bureau has provided separate forms for use in injury and death cases which shall be furnished to any person desiring to file such a claim, upon application therefor made to such deputy commissioner.

(Sec. 19(a), 44 Stat. 1435; 33 U.S.C. 919(a))

#31.12 Form of compensation orders; service thereof.

(a) Orders adjudicating claims for compensation or suspending payments of compensation shall be designated by the term "compensation order" followed by a descriptive phrase designating the particular type of such order, such as "award of compensation", "rejection of claim", "suspension of compensation", "modification of award". All compensation orders shall contain the name of the Bureau and agency, the designation of the compensation district, the names of the parties in interest, a statement of the basis for the order (that is, whether upon a claim, an application for suspension of compensation, an application for modification of award, etc., with a statement by whom made, and whether a hearing was held or applied for), findings of fact, an award, rejection, or other appropriate paragraph containing the action of the deputy commissioner, and appended thereto shall be a paragraph headed "proof of service", containing the certification of the deputy commissioner that a copy of the compensation order was on a date stated sent by registered mail, with the names and addresses of the parties to whom sent. Com-

pensation orders shall be signed by the deputy commissioner at two places, (1) following the action paragraph, and (2) following the certification under the "proof of service".

(b) Copies of compensation orders shall be served personally or by registered mail upon the claimant, the employer and the insurance carrier at the last known address of each.

#31.13 Contents of findings of fact.

(a) All original compensation orders shall contain, in the paragraph headed "findings of fact", findings with respect to the names and addresses of the parties in interest, the date and place of injury or alleged injury, the circumstances surrounding the accident or alleged accident, the nature and extent of the injury or alleged injury, notice of injury or death, the average weekly wage and such other facts as may be necessary to determine all of the issues raised before the deputy commissioner upon the hearing of the case or otherwise, but in case of rejection of the claim the deputy commissioner may in his discretion omit any finding unnecessary to support such action. In all death cases the dates of birth of each claimant shall be found in the compensation order; in such cases involving aliens, findings with respect to such alienage shall be made. In cases in which the claim is rejected, the ground for such rejection shall be stated in a paragraph following the findings of fact. Where failure to give notice of injury or death is excused pursuant to the provisions of section 12(d) of said act (44 Stat. 1431; 33 U.S.C. 912(d)), the fact of such excuse together with the ground thereof shall be stated in the compensation order.

(b) In compensation orders other than the original order the statement of the basis for the

order shall contain reference to all prior compensation orders with the dates thereof. In such orders the findings of fact shall relate only to the immediate issues before the deputy commissioner, without restatement of facts found in any prior compensation order relating to the same injury or death, unless necessary for the completeness of the compensation order.

(c) Findings of fact shall be stated positively; that is, without equivocation or qualification. All ultimate facts necessary to support the action of the deputy commissioner shall be found. Recitals of evidence, statements of opinion, and citations to authorities shall be avoided in a compensation order.

(d) The findings of fact may contain, in addition to the ultimate facts necessary to support the action of the deputy commissioner upon the issues before him, findings relating to services rendered on behalf of the claimant by his authorized representative, and relating to the approval of bills for medical treatment and other attendance or treatment authorized to be obtained by an employee under the provisions of section 7 of said act. 44 Stat. 1427; 33 U.S.C. 907.

## STATEMENT OF THE CASE

The claimant adopts carrier's statement of the case with the following clarifications[4]:

a. (Carrier's 6-7) When the carrier stopped payment of temporary total compensation of $54.00 per week effective 20 April 1965 (App. 8), and thereupon commenced compensation of $27.00 per week for 50%

[4] Reference hereafter to carrier's brief will be "Carrier's (page nr.)".

temporary partial disability (App. 9), the reduction was made by the carrier of its own volition with no adjudication having been made by the deputy commissioner on the claim filed.

b. (Carrier's 7) When the carrier stopped payment of temporary compensation as the maximum allowed therefor by the Act had been paid (App. 12, 14), neither the carrier nor the claimant applied to the deputy commissioner for a hearing and adjudication of the pending claim for permanent disability. Further, the deputy commissioner did not set the claim down for hearing and adjudication as required by #914(h) and #919(a) and (c) of the Act.

c. (Carrier's 8) The carrier states that the deputy commissioner's order of 24 May 1971 (App. 18) rejected claimant's claim for permanent disability as more than one year had elapsed between the date of last compensation payment and "the new claim for permanent total disability advanced by claimant's attorney. (App. 16-20, 29)". The deputy commissioner's order merely states, "that claimant's attorney on February 11, 1970 filed claim for additional compensation based on permanent total disability; . . .". (App. 18 at Paragraph 10) In fact, claimant's letter of 11 February 1970 to the deputy commissioner was a request for hearing on the one and only claim which was filed on 12 August 1960; there was no "new" claim filed. (App. 15 at Paragraph 12; 29)

d. (Carrier's 8) When claimant filed suit in the district court to set aside the deputy commissioner's first order of 24 May 1971, the carrier was not made a party to the action. In like manner, when the carrier

filed suit in the district court to enjoin enforcement of the deputy commissioner's second order dated 8 February 1972 after remand, the claimant was not made a party to the action. (App. 25)

e. (Carrier's 9) The United States Court of Appeals did not hold "that the time limitation provisions" of the Act did not bar the claimant's claim as such. Rather, the court held that the specific time limitation in #922 of the Act was not applicable to bar a pending claim filed under #913(a) which was still awaiting adjudication, by the deputy commissioner and rejected the 5th Circuit's conclusion to the opposite in *Strachan Shipping Company v. Hollis,* 460 F.2d 1108 (5th Cir. 1972) *cert. denied,* 409 U.S. 887 (1972). (App. 34-37) In addition to the time limitation in #922 of the Act, there are other time limitations in the Act, e.g., #913, time for filing claims, and #921(a), time limitation as to review of compensation orders.

## ARGUMENT

### 1. APPLICATION OF GENERAL RULES OF CONSTRUCTION.

The carrier contends that the plain language of #922 bars the claimant. This "plain language" is arrived at by construing the wording of the section by itself, and not in its relationship with the Act as a whole. The court of appeals below found the same section, when so construed, to be ambiguous. The court properly turned to other sources to determine whether Congress intended the time limitation in #922 to apply to cases in which no final order was made. (App. 31-32) As to the issue, "cases in which no final order was made" means a timely claim for permanent disability has been

filed by the claimant under #913(a), over a year has expired since the carrier made a payment of compensation for temporary disability, and the claim remains pending never having been adjudicated by the deputy commissioner. In turning to these other sources, as the legislative history of #922, available case law on the issue, and consideration of the Act as a whole with its implementing regulations, it first is necessary to determine the nature of the Act as a whole to secure guidance in the construction of its several parts.

The Act has been before this court before, and this court has declared the general rule of construction that it is to enjoy. In construing the computation of temporary and permanent disability compensation under the Act, this court stated in *Baltimore and Philadelphia Steamboat Company v. Norton,* 284 U.S.408, 414 (1932):

> "The measure before us, like recent similar legislation in many States, requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work whether with or without fault attributable to employers. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results."

The court has adhered to this liberal rule of construction as to the requirement under the Act that notice of an employee's injury be given to the employer, for the court would not allow the employer to ignore the notice

of its responsible agents at the job site though the employer's representative in charge of the job site may not have been informed. *Voris v. Eikel,* 346 U.S. 328, 333 (1953). In a like manner, this court has construed the Act liberally to afford protection to a longshoreman by holding that the Act would not proscribe an injured longshoreman to recover from a bareboat charterer or a shipowner. *Reed v. The Yaka,* 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co., Inc.,* 386 U.S. 731 (1967). Alternatively, the court recognizing that this is a humanitarian act and should be construed liberally to effectuate its purposes, as held in a six to three decision that it could not by construction in effect rewrite #913(a) of the Act so that "injury" meant "disability". *Pillsbury v. United Engineering Company,* 342 U.S. 197, 200 (1952). Thus, the court majority in that case would not so construe #913(a) so as to extend the liability of the employer and its insurer into the indefinite future where no claim had been filed within one year of the injury itself. This general rule of liberal construction to favor the injured employee is reinforced by the Act itself, as in #920(a), that it shall be presumed in absence of substantial evidence to the contrary that a claim comes within the provisions of the Act; and, as in #923(a), that the deputy commissioner is not to be bound by common law or statutory rules of evidence or by technical or formal rules of procedure except as provided in the Act itself, and that investigations or inquiries shall be made and the hearings conducted in such a manner as to best ascertain the rights of the parties.

## 2. COMPARISON OF #922 WITH OTHER STATUTORY PROVISIONS OF THE ACT AND IMPLEMENTING REGULATIONS.

Next, to construe #922 and to determine its applicability to the facts in claimant's case, comparison should be made to the other provisions of the Act and its implementing regulations.

The section requiring the timely filing of a claim by an injured employee is #913(a) of the Act. Its pertinent wording here is:

> "#913. Time for filing claims
>
> "(a) The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed one year after the injury, . . . except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of last payment . . . ."

The language mandating that when a claim must be filed on penalty of the right to compensation for disability being barred is in the alternative. If a claim is not filed within a year of the injury, the alternative is that the claim must be filed within a year of the last compensation made *without an award on account of such injury*. The time periods for filing this claim are not in any way in the disjunctive, that is, a claim must be filed within one year of the injury, but if compensation has been made without an award then in that event another claim must be filed within one year of this payment. Further, there is no language in #913(a) (or in #922 for that matter) that states that such a claim filed is subject to any provisions of #922. In the

claimant's case, the fact is that his claim for permanent disability was timely filed within one year of his injury. (App. 3) The implementing regulations of the Bureau of Employees' Compensation are drawn to a like effect. 20 C.F.R. #31.5 (1972).

The facts in the claimant's case also show that the carrier controverted claimant's right to temporary total disability on 6 January 1965 (App. 7); that effective 21 April 1965 it reduced temporary total disability compensation to 50% temporary disability (App. 9); and, that on 23 January 1968 it terminated all temporary disability compensation as the then statutory maximum of $17,280.00 for temporary disability compensation had been paid (App. 12). In light of these facts, examination must be made of any statutory provisions that may require action by the deputy commissioner. The applicable provisions are:

"#914. Payment of compensation

. . . .

"(h) The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties."

. . . .

"#919. Procedure in respect of claims

"(a) Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

. . . .

"(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

"(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose.

"(e) The order rejecting the claim or making the award (referred to in this chapter as a com-

pensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each."

. . . .

The above provisions placed a clear duty upon the deputy commissioner to take action to properly protect the rights of all parties. Section 919(a) is clear that the deputy commissioner was vested with full power and authority to hear and determine all questions as to a claim filed under the provisions of #913(a). Again, as discussed in the examination of #913(a), above, there is no language in #919(a) that the deputy commissioner's power and authority is subject to any precedent exceptions or limitations by #922 prior to such hearing and determination. See also 20 C.F.R. #31.12 and #31.13 (1972) as to the form of compensation orders, and contents of findings of fact. The facts in claimant's case show that the deputy commissioner did not act to hear and determine his claim for permanent disability, filed under #913(a), until application therefor was made by claimant's counsel on 11 February 1970, whereupon the hearings and orders by the deputy commissioner here in issue were made. (App. 15, 16-20, 21-24, 29). In like manner, the claim never having been adjudicated, the carrier had an equal right at any time to itself apply to the deputy commissioner under #919(c) in order to assure itself by its "voluntary execution" of the Act to "properly protect the rights of all the parties" under #914(h). For some reason, the carrier did not pursue the matter in spite of its declared adherence to voluntary execution of the Act.

Up to this point, there is nothing to be shown that the deputy commissioner's power and authority to hear and determine claimant's claim was not continuing and effective when the hearings were held. However, the carrier states that the plain language, much less the legislative history, of #922 barred the deputy commissioner from hearing the claim. This section reads:

"#922. Modification of awards

Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary."

As to its language, the section title specifies that it is applicable to "modification" of awards. As #919(a) declares that the deputy commissioner has full power and authority in the first instance to hear and determine all questions in respect of a claim, the deputy commissioner need not look to #922 to hold a hearing and by his order reject the claim or make an award as to the claim filed under #913(a).

Likewise, the wording "on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner" must, if the section title is to have any applicability, refer to a "modification" of a prior order by the deputy commissioner. The court of appeals said the wording as to a mistake in determination of fact implied reference to a prior order having been entered as to a claim, for findings of fact are only required in a compensation order. (App. 31-32) The court stated, however, that the wording "a change of conditions" was ambiguous because this change may refer to conditions found by the deputy commissioner in a prior order or which existed when payments were made without an order. (App. 32) Yet, if #919(a), (c)-(e), are to be given any effect, any change of conditions or mistake in determination of fact by the deputy commissioner must be as to a prior formal hearing and an order of the deputy commissioner thereon either rejecting the claim or making an award of compensation, for indeed, until this order is issued under #919(a) and (c), the deputy commissioner had the power and authority to determine the matter, and there would be nothing to modify or upon which the power in #922 could act.

Additionally, the language in #922, stating that the deputy commissioner may "review" a compensation case, "issue a new compensation order", and that "such new compensation order shall not affect any compensation previously paid", is all language in reference to an order having been theretofore made. As stated above, such an order could only have been issued under the power and authority given the deputy commissioner under #919(a) as to a claim filed under #913(a).

Thus, we are now brought to the only words in #922, which taken by themselves, would imply that all of the above is to the contrary notwithstanding, for the time limitation is to apply "whether or not a compensation order has been issued", and thus the claimant's claim filed 18 August 1960 is time-barred as another claim was not filed within one year of the last payment of temporary compensation on 23 January 1968. (App. 3, 12). In other words, the carrier's contention is that under #922 the claimant had to file another claim before 23 January 1969. The obvious effect is, as seen from construing the several applicable sections of the Act as a whole, to place #922 at war with the other sections: A claim filed under #913(a) as required to establish a right to compensation under the Act in the first instance is circumvented by so-called "voluntary" payment or execution of the Act under #914(a)-(g) (which coerces the "voluntary" execution); the deputy commissioner's action to protect the rights of all parties required under #914(h) is avoided (though the carrier itself can apply for a hearing); and, the power and authority of the deputy commissioner under #919(a) and (c) to hear and determine all questions in respect of a claim filed under #913(a) has been negated. "Nothing less than compelling language would justify

such construction of the Act" which is to be construed liberally, ". . . and, if possible, so as to avoid incongruous or harsh results." *Baltimore and Philadelphia Steamboat Company v. Norton, supra,* at 413-414.

### 3. HISTORY OF #922.

To construe #922 by itself, necessarily reference must be had to its legislative history. Even this history, however, is not in a vacuum but must be in reference to the Act as a whole and its purpose. Initially, the section read as follows:

> "Sec. 22. Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time during the term of an award and after the compensation order in respect of such award has become final, review such order in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, increase, or decrease such compensation. Such new order shall not affect any compensation paid under authority of the prior order."
>
> Mar. 4, 1927, c. 509, #22, 44 Stat. 1437.

It was found that this wording frequently precluded modification of an award where the deputy commissioner's order was entered after the term of the award had expired. (App. 32, 33) Suffice it to say that the wording was then clear that modification could only apply where a prior compensation order had been entered.

In 1934 the section was amended so as to read as follows:

> "Sec. 22. Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, review a compensation case in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the commission."
>
> May 26, 1934, c. 354, #5, 48 Stat. 807.

The House and Senate reports as to the above amendment read as follows:

> "Section 5 of H.R. 8057 (S.2794) amends section 22 of the existing act so as to broaden the grounds on which a deputy commissioner can modify an award and also while strictly limiting the period, extends the time within which such modification

may be made. The Commission in its Seventeenth Annual Report (p. 18) states:

> Section 22 of the Longshoremen's Act provides for a reconsideration or review by him (a deputy commissioner) of his action with less authority to do justice to the parties than is contained in any provision for a similar purpose in any State-compensation law. A review now authorized 'during the term of an award' is not sufficient in the interest of justice. In many cases the 'term of award' has ended when the compensation order is issued.
>
> The amendment is in line with the recommendation of the Commission except that it limits to one year after the date of the last payment of compensation the time during which such modification may be made."

S.Rep.No. 588, 73rd Cong., 2d Sess. April 3, 1934; H.Rep.No. 1244, 73d Cong., 2d Sess. April 16, 1934.

The wording of the committee reports is clear that modification to be allowed is only as to an award by a deputy commissioner. This is further clarified by the amendment itself still continuing the use of language "issue a new compensation order" and "such new order" as had theretofore existed in the section. (App. 33) The committee reports made reference to the deputy commissioner being limited to making a modification of an award only during the term of the award, and the language "whether or not a compensation order was issued" was to clarify that under the amendment that the deputy commissioner could modify an award whether or not payment to a claimant had stopped before or after the order concerned had been entered. There is no showing in carrier's brief (pages 17-21) that the foregoing language is not used in this context. To bring the

section to its current wording, the section was amended in 1938 to clarify and permit the deputy commissioner to modify an order rejecting a claim. The court of appeals again stressed that the house committee report as to this amendment stated that the modification to be allowed was as to compensation cases wherein an order had been entered by the deputy commissioner. (App. 34)

As to the interpretation of the wording in question, the carrier [as did the district court in *Strachan* at 323 F.Supp. 1123, 1124 (S.D. Tex. 1970)] cites *American Mut. Liability Ins. Co. of Boston v. Lowe,* 85 F.2d 625 (3d Cir. 1936), for the proposition that the time limitation in #922 applies whether or not a compensation order has issued. In fact, the 3d Circuit held that the deputy commissioner had never issued an order as required by #919(e) (and therefore the jurisdiction of the deputy commissioner continued). The court then proceeded *en arguendo* as to the insurer's contention, that if it held the deputy commissioner's memorandum to be a formal order (which it did not), the deputy commissioner could nevertheless hold a hearing and modify said order based on #922 as was initially promulgated in 1927; that as to the 1934 amendment, the proceedings were still pending; and, that even if the 1934 amendment applied, the deputy commissioner could issue his order following the one year limitation period. The argument was *dicta.* If otherwise it should not be followed.

Finally, in considering the legislative history of #922, this court recently had the same section before it for construction in a case also from the 5th Circuit, see *O'Keefe v. Aerojet-General Shipyards, Inc.,* 404 U.S. 254 (1971). In this case, where the claimant had peti-

tioned for review of an order rejecting his claim for compensation, the deputy commissioner found contrary to his initial order and awarded compensation, which order was sustained by the district court. The 5th Circuit reversed on the grounds that there was no new evidence clearly demonstrating mistake; therefore, the deputy commissioner did not have the jurisdiction to receive additional but cumulative evidence and change his mind. This court stated that neither the wording of the statute nor its legislative history would support such a narrowly technical and impractical construction. In discussing the history of #922, this court referred to the same house and senate committee reports as to the 1934 amendment as basis for the congressional intent to broaden the deputy commissioner's grounds to modify an award. The context of the court's discussion on modification is as to a prior order issued by the deputy commissioner. In like manner, it is submitted that the position of the carrier and the 5th Circuit in *Strachan, supra,* is a narrowly technical and impractical construction, and is a construction again attempting to restrict the scope of the deputy commissioner's review. Such a position precludes the deputy commissioner from adjudicating a claim filed under #913(a) and is in derogation of the deputy commissioner's power and authority to hear and determine the claim under #919(a). Having evaded this adjudication, then the carrier would evade the deputy commissioner's review under the one-year limitation in #922.

## 4. THE VALIDITY OF THE STRACHAN CASE.

The reasoning of the 5th Circuit in the *Strachan* case, *supra,* should be rejected. The effect of this decision rejects the long standing rational interpretation by the agency charged with the Act's administra-

tion, *Strachan, supra,* Ainsworth, J. dissenting at 460 F.2d 1116-1120. The construction given the Act by the Bureau of Employees' Compensation in *Strachan,* and by the respondents here should be deferred to and sustained. *Udall v. Tallman,* 380 U.S. 1, 16 (1965). The effect of *Strachan, supra,* and the position of the carrier is to nullify the power and authority of the deputy commissioner under #919(a) to hear and determine all questions as to a claim filed under #913(a); requires a claimant to re-file claims within each year wherein compensation has been paid without an award so as not to be time-barred (though a timely-filed claim under #913(a) has not been adjudicated by the deputy commissioner); and, is an attempt to restrict the deputy commissioner's scope of review under #922. As the Act is to be construed liberally in furtherance of its humanitarian purpose, such a narrowly technical and impractical construction resulting in incongruous and harsh results upon an injured claimant should be firmly rejected. *Baltimore and Philadelphia Steamboat Company v. Norton, Voris v. Eikel, Reed v. The Yaka, Jackson v. Lykes Bros. Steamship Co., Inc., Pillsbury v. United Engineering Company,* and *O'Keefe v. Aerojet-General Shipyards, Inc., supra.* The carrier makes much of the self-executing provisions of the Act and that employers and their insurers should not be penalized by their "voluntary" action. However, having knowledge that the claim filed under #913(a) has never been adjudicated, the carrier can by its voluntary action request a hearing so that the extent of its liability *vel non* can be adjudicated. #919(c); *cf. Atlantic & Gulf Stevedores, Inc. v. Donovan,* 274 F.2d 794 (5th Cir. 1960). Further, there is no room for the argument in *Strachan, supra,* that it is inequitable to simultaneously endorse "voluntary compliance" with the Act by employers and their

insurers and at the same time approve the deputy commissioner's failure to terminate compensation cases. As stated, the carrier here and in *Strachan, supra,* were free to act but did not do so. The carrier cannot shift its cost because of administrative delay onto the less fortunate claimant. *N.L.R.B. v. Electric Vacuum Cleaner Company, Inc.,* 315 U.S. 685 (1942); *NLRB v. J. H. Rutter-Rex Manufacturing Co., Inc.,* 396 U.S. 258 (1969). Accordingly, the carrier's reference in its brief (p. 25-26) to the Bureau's statistical accounting and the thousands of cases that could be "opened" has no standing. The fact that very few claims are formally heard and adjudicated merely substantiates that the self-executing provisions of the Act have been efficient, except, of course, in a small number of cases as with the claimant here.

It was the claimant's position in his brief in opposition to the petition for writ of certiorari being heard that the *Strachan* case, *supra,* could be distinguished, and thus distinguished, there was no conflict in circuit opinions on the issue. The court deciding to hear the matter, for all the reasons above, the position of the carrier in this case and the reasoning in *Strachan* should be rejected. The fact that there are unreported cases holding as in *Strachan* referred to in carrier's brief (page 24) does not give credence to the carrier's position and to *Strachan* - if anything, it stresses the necessity to reject the carrier's position and the reasoning in *Strachan.*

## CONCLUSION

Accordingly, it is respectfully submitted that the judgment of the court of appeals below should be affirmed.

Respectfully submitted,

/s/ J. de R. Capps

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

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No. 74-362

INTERCOUNTY CONSTRUCTION CORP., and

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Petitioners,

v.

NOAH C. A. WALTER, Deputy Commissioner,

U.S. DEPARTMENT OF LABOR

Bureau of Employees Compensation

and

MARY JONES,

Respondents.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 1975, copies of the Reply Brief for Respondent were airmailed with airmail postage prepaid, to the Solicitor General of the Department of Justice, Washington, D.C. 20530, and Joshua T. Gillellan, II, Esq., Room N 2716, New Labor Building, Department of Labor Office, 200 Constitution Avenue, Washington, D.C. 20210; and to John C. Duncan, III, Suite 1010, 1000 Connecticut Avenue, N.W., Washington, D.C. 20036, attorney for Petitioners, Intercounty Construction Corp. and Hartford Accident & Indemnity Company. I further certify that all parties required to be served have been served.

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